



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Succession Cause 92 of 1993

IN THE MATTER OF THE ESTATE OF KAMAU THUKU (DECEASED)

RULING

The application before me is that of 18th July, 2005 to revoke the grant of probate of written will made on 22nd April, 1993.

The Applicants aver that they are children and 2nd wife of the deceased. It is conceded that 11th Applicant i.e. 2nd wife left the deceased in 1968 with six of her children, while four children including deponent, Esther Wambui of affidavit in support, stayed back and continued to occupy the portion of 7 acres from the land bearing L.R. No.Loc.2/Mariira/1326. It is also disclosed that deceased filed a case being H.C.C.S. No.3093/96 against the 11th Applicant and one Maina Wanjiru to evict them from the land on the claim of trespass. There was an interim order of 18th July, 1990 in the suit which, according to the Applicant, was dismissed for non-prosecution, although no document is either before the court or in the said affidavit.

The Applicants also rely on supplementary affidavit sworn on 12th January, 2006 and further supplementary affidavit sworn on 30th November, 2006. They also rely on a supporting affidavit of one Daniel Njihia Kamau sworn on 8th August, 2006.

It is noted by me that the case mentioned hereinafter is definitely not against the deponent who claims to stay there and that as per her evidence she was given 2 acres by the deceased and that she gave a goat to him in return.

The deponent is asking the court to nullify the will on the ground of mental incapacity of the deceased as he suffered stroke. The medical evidence (notes and receipts of medicines) is in my view, not sufficient to show the mental incapacity of the deceased.

Only because he died after around 2 to 3 months from the date of his will, cannot raise a presumption either in law or in fact of his mental incapacity, as the Applicants are asking me to do. Daniel Njihia Kamau, the 3rd son of 3rd wife of the deceased in his affidavit avers that the deceased was unable to write the will, as he was looking after the deceased and that although he knew the witnesses of the will they were not present when the will was being made and he further averred that the deceased was made to sign the same. He emphasized that the portion of land in issue does belong to Esther, the deponent. He has annexed a consent letter dated 3rd August, 2006 alleged to have been signed by several members including Helina Wambui who has sworn an affidavit on 22nd September, 2006 denying that she was a party to the consent. The said consent letter is addressed to "the High Court Nairobi". It was written in the letter that the part of the land in question be given to the 1st Applicant herein.

I do note that Helina has thumb printed the affidavit and has averred that she did not know how to write or read. But the consent letter has shown that she had signed the same.

One Peter Mwangi Kamau a brother to the said Daniel Njehia Kamau has averred in his affidavit sworn on 14th October, 2006 that the latter is an alcoholic and is an estranged brother who had sold his share of the estate and has a dispute with the Executrix, and hence to file an untrue affidavit.

Similarly, Tabitha Wambui Kamau has sworn an affidavit on 14th September, 2006 stating that the will was executed in the office of his Advocate.

All these averments are simply denied by further Supplementary Affidavit of the 1st Applicant sworn on 30th November, 2006.

In her affidavit sworn on 2nd November, 2005 the Executrix has averred that only 1st Applicant Esther, Joseph Kinyanjui and David Nganga were the children of the deceased. The others were born out of illegal relationship. She has stated that the two male children of 11th Applicant were given 11 acres and a plot at Njiru and that the plot of 2 acres which was given to the 1st Applicant Esther was taken back by the deceased when she ran away to join her mother. In that affidavit, she has also averred that after the death of the deceased Francis Maina, Joel Kimani and Eshter Wambui trespassed the land and her daughter Tabitha has complained to the police against the trespass.

This application although has been filed in the names of other ten Applicants, is only fought by the 1st Applicant. Even the other two persons who are averred to have trespassed the land have not filed any affidavit.

The main issue of mental incapacity of the deceased, as I have already indicated hereinbefore, has not been proved on the balance of probability. The onus to prove the medical ailment is on the Applicants, which has not been discharged by them, or I should say, the 1st Applicant, as I have only her evidence.

The delay in filing this application also is not appropriately explained, although I am aware that there is no time limit prescribed under Section 76 of the Law of Succession. Act (Cap.160). However, it is trite law that any Applicant has to show due diligence to assert his claim, which these Applicants have failed to show.

There is no doubt that there has been dispute on this land between the parties and thus I cannot agree that the seven acres should be given to the Applicants. The letter from the Chief which has been produced by the 1st Applicant leaves many gaps as to its validity. I say so also, on the ground that the deceased, after said letter had filed a civil suit in the High Court.

The grant of probate is confirmed long time ago and it shall be unfair to upset the settled estate, at least under the circumstances of this case.

I thus dismiss the application dated 18th July, 2005 with costs.

Dated and Signed at Nairobi this 15th April, 2008.

K.H. RAWAL

JUDGE

15.4.08

